



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: M.C. Dean Electrical Contracting, Inc.

File: B-248835.2

Date: November 16, 1992

Christopher J. Brasco, Esq., Tara L. Vautin, Esq., and Robert G. Watt, Esq., Watt, Tieder, Killian & Hoffar, for the protester.

Jay L. Cohen, Esq., for Electric Masters Service, Inc., an interested party.

Bradley E. Laxson, Esq., and John P. Opitz, Esq., Department of the Housing and Urban Development, for the agency.

John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency acted improperly in allowing only one offeror to revise its price proposal to reflect a new wage rate determination after the selection of that offeror for award, but prior to the award of the contract, is denied where there is no reasonable possibility that the protester, which submitted a higher priced offer, would have improved its relative standing had it been provided with an opportunity to submit a revised price proposal based on the new wage determination.

DECISION

M.C. Dean Electrical Contracting, Inc. protests the award of a contract to Electric Masters Service, Inc., under request for proposals (RFP) No. DU100P9200018061, issued by the Department of Housing and Urban Development (HUD) for electrical/cable work at the HUD headquarters building and other HUD facilities in the Washington, D.C., metropolitan area. Dean protests that HUD acted improperly in allowing only Electric Masters to revise its price proposal to reflect a new wage determination and that HUD was biased in favor of Electric Masters.

We deny the protest.

The RFP, issued on January 10, 1992, contemplated the award of a firm, fixed-price, indefinite quantity contract for a base period of 1 year with two 1-year options. The successful contractor under the RFP is required to furnish all

labor, tools, materials, and equipment necessary to provide the electrical services specified in the solicitation's statement of work. The RFP provided for award to the responsible offeror whose proposal was most advantageous to the government, technical quality being more important than price.

The proposal preparation instructions required the submission of a technical proposal and a price proposal. For cost evaluation purposes, the agency pre-priced the anticipated items of work at a constant cost for all offerors, and requested each offeror to propose a percentage factor, plus or minus, for the base year and 2 option years that would be applied to all the pre-priced line items to determine the amount the contractor would be paid.¹ Offerors were informed that their proposed percentage factors were to include their overhead, profit, wages and fringe benefits, escalation, cost of insurance and bond premiums, and all other contingencies. The solicitation incorporated a Department of Labor (DOL) wage rate determination, and noted that the procurement was being conducted in accordance with HUI's alternative source selection procedures. These procedures, set forth at 48 C.F.R. § 2415.613 (1991), allow for discussions with offerors in the competitive range, followed by the selection of one or more offerors for final negotiations leading to award.

The agency received five proposals in response to the RFP. Three offers, including those of Dean and Electric Masters, were included in the competitive range. Discussions were held, and best and final offers (BAFO) received and evaluated. Electric Masters's BAFO received a technical score of 99.8 out of 100 points, at a proposed price of minus 62 percent. Dean's technical proposal received a score of 99, at a proposed price of minus 55.5 percent. The agency, noting that the technical scores of Electric Masters and Dean were essentially equal, determined that a final contract should be negotiated with Electric Masters based on its lower price.

Prior to informing Electric Masters that it had been selected for award, the agency learned that a new wage determination applicable to this procurement had been issued

¹For example, under one item of work the successful contractor would be required to "[i]nstall ceiling hung exit light fixture, including making electrical connections at fixture, outlet, and supports." This item was pre-priced by the agency at \$32.68 if performed during normal working hours, and \$37.58 if performed during non-working hours. The contractor would be paid at the fixed percentage it proposed as applied to the pre-priced line item.

by DOL, which raised the wage rate for electricians from \$19.82 per hour plus fringe benefits of "\$3.65+3 [percent]" to \$20.79 per hour plus fringe benefits of "\$3.80+3 [percent]." The agency advised Electric Masters of the new wage determination, and informed Electric Masters that it would be permitted to revise its price proposal if Electric Masters deemed it necessary. Electric Masters subsequently submitted a revised price of minus 56 percent, and the agency made award to Electric Masters at that price.

Dean protests that the agency acted improperly in allowing only Electric Masters to revise its price proposal to reflect the new wage determination after Electric Masters's selection, since no award had been made.² Dean points to Federal Acquisition Regulation (FAR) § 22.404-5(c), which requires a contracting agency, upon receipt of a new wage rate prior to the award of a contract by negotiation, to "furnish the wage rate information to all offerors that submitted proposals [and provide those offerors with] a reasonable opportunity to amend their proposals." Dean therefore concludes that it should have been provided with the new wage determination and allowed to submit a revised price proposal.

The record shows that even if Dean had been provided with the new wage determination and the opportunity to submit a revised price proposal, its relative standing would not have improved vis-a-vis Electric Masters's lower priced offer. In this regard, Electric Masters's revised proposed price of minus 56 percent is still lower than Dean's proposed price of minus 55.5 percent, notwithstanding the increase in wage

²To the extent Dean protests HUD's use of its alternative source selection procedures in this procurement, its protest is untimely and will not be considered. The RFP stated that the "[s]ource selection shall be made in accordance with [HUD's] established [a]lternative source selection procedures." The RFP explained that under these procedures the "[s]election shall be made following discussions and evaluations of [BAFOs] from all offerors in the competitive range," and a "definitive contract will be negotiated with the firm selected." Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992), protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. Because it was apparent from the RFP, as issued, that the procurement would be conducted in accordance with HUD's alternative source selection procedures, Dean's protest challenging the use of these procedures, filed after the selection of Electric Masters for award, is untimely. Caldwell Consulting Assocs., B-242767; B-242767.2, June 5, 1991, 91-1 CPD ¶ 530.

and fringe benefit costs engendered by the new wage determination. Although Dean was provided with the new wage rate determination during the course of this protest, it has not argued that it would have lowered its proposed price had it been provided with the new wage rate during the conduct of the procurement. In fact, by pointing out that "a revised wage rate not only effects the offeror's labor costs, but bonding and insurance costs as well," and arguing that because of this "HUD could not properly anticipate that all offerors would be equally affected by this new wage rate determination," Dean essentially concedes that, had it been given the opportunity, it would have raised its proposed price, although not necessarily in the same amount as Electric Masters did. Given that Electric Masters's technical score was slightly higher than Dean's, and that Electric Masters's proposed price was slightly lower notwithstanding that Electric Masters's price was based on a wage rate determination mandating higher wages than those on which Dean submitted its price, we can perceive no basis on which to find that the relative standing of Electric Masters and Dean would have changed had Dean been advised of the new wage rate determination and given the opportunity to submit a revised price proposal.


Prejudice is an essential element of every viable protest, Lithos Restoration Ltd., 70 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379, and we will sustain a protest challenging an agency's actions where there is a reasonable possibility that the protester was prejudiced by the agency's actions. George A. Fuller Co., B-247171.2, May 11, 1992, 92-1 CPD ¶ 433. While any doubt concerning the existence of prejudice will be resolved in the favor of the protester, IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378, we will not presume prejudice where the record establishes that the protester was not prejudiced by the alleged violation of regulation. Therefore, we need not consider whether HUD acted properly in allowing only Electric Masters to revise its price proposal to reflect the new wage rates. See Labrador Airways Ltd., B-241608, Feb. 13, 1991, 91-1 CPD ¶ 167.

Dean argues that the agency was biased in favor of Electric Masters, as evidenced by HUD's alleged preference for Electric Masters during its procurement of similar services in 1989. Dean also speculates that HUD may have disclosed the prices submitted by competing offerors under this procurement to Electric Masters.

The burden of affirmatively proving bias is borne by the protester; improper motives will not be attributed to agency procurement officials on the basis of inference and supposition since contracting officials are presumed to act in good faith. Watson Indus., Ltd., B-238309, Apr. 5, 1990, 90-1 CPD ¶ 371. Dean has not presented any credible evidence of

bias or favoritism; indeed, Dean's very high technical rating seemingly belies this contention. HUD's alleged actions in the 1989 procurement are not credible evidence that the agency failed to act in good faith in this procurement.³ Mictronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185. Dean has not presented any credible evidence that HUD disclosed the price proposals of competing offerors to Electric Masters. HUD insists that it did not release any pricing information to any of the offerors during the conduct of the procurement, and we note that Electric Masters did not revise its proposed price on submission of its BAFO.

The protest is denied.


for James F. Hinchman
General Counsel

³We note that we have been informed by HUD that its Office of the Inspector General investigated Dean's allegations concerning the conduct of the 1989 procurement in 1989, and found that they were without merit.